Multimedia Development Corp Sdn Bhd v Clarence Augustine Tee Teck Huo

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-1880–10 OF 2016
DAVID WONG, HAMID SULTAN AND HASNAH HASHIM JJCA
23 JANUARY 2018

Labour Law — Industrial Court — Award — Whether the Industrial Court's ('IC') decision-making process or award tainted by impropriety, irrationality or illegality — Whether although employer dismissed workman after holding a domestic inquiry IC not wrong to have ignored the domestic inquiry and conducted a full trial to determine whether the misconduct alleged against the workman was proven — Whether there was overwhelming evidence to establish the charges of misconduct against the workman — Whether his dismissal was justified — Whether High Court wrong on judicial review application to quash the IC's award and substitute its own findings for those made by the IC

The appellant dismissed the respondent from employment after a domestic enquiry found him guilty of: (a) falsifying an overseas travel claim ('OTA') to mislead the appellant's finance department into believing that the OTA that had been approved for him was RM30,869 when, in fact, only RM21,297 had been approved; (b) creating a fictitious email purportedly addressed to him from a person in America to mislead the appellant into believing that the respondent was required to be present at a meeting there three days earlier than was originally scheduled in order to justify the falsified OTA; and (c) abusing his position in the company by using his secretary's computer to compose and send several emails to various parties as if they had been sent by his secretary, when, in fact, she had no knowledge about those emails. The respondent sought redress under the Industrial Relations Act 1967 over his dismissal. His complaint was referred by the Minister to the Industrial Court ('IC') for adjudication. After a trial, the IC ruled that the appellant had proven the three charges against the respondent and that his dismissal was with just cause or excuse. The High Court allowed a judicial review application by the respondent to quash the IC's award. The court remitted the matter back to the IC to assess the compensation in lieu of reinstatement that was payable to the respondent for wrongful dismissal. The High Court held, inter alia, that: (i) the IC committed an error of law in not considering the validity and relevancy of the domestic inquiry ('DI'). This was because the respondent relied on the DI's notes of proceedings to show that he had no intention to deceive the appellant in the manner stated in the three charges; (ii) the charge concerning the fictitious email had not been proven because no expert evidence was adduced to establish that the email was forged or fabricated; (iii) the evidence did not show

any intention on the respondent's part to defraud or deceive as he never received the falsified amount of the OTA; and (iv) the IC committed serious errors of law in arriving at its decision including taking into account irrelevant matters, not taking into account relevant matters and acting against the weight of the evidence. The instant appeal was against the High Court's decision.

Held, unanimously allowing the appeal, setting aside the High Court's decision and reinstating the IC's award:

(1) Even though the Industrial Court ('IC') might not have referred to or relied on the notes of proceedings of the domestic inquiry ('DI'), it had heard the case on its merits. The respondent and the appellant were given the opportunity to call witnesses to testify in support of their respective cases. The IC did not need to rely totally on the notes of proceedings of the DI and it was not wrong for it to have ordered a full trial to determine whether the alleged misconduct was established and whether the proven misconduct constituted just cause or excuse for the dismissal. There was ample evidence to support the several findings of the IC on its decision to prefer the appellant's evidence over the respondent's (see paras 34–36).

(2) The IC adopted the correct approach and applied the correct standard of proof and on balance of probabilities found the appellant had committed the acts stated in the charges against him. There was overwhelming evidence that the respondent had attempted to mislead the appellant's finance department into believing that the CEO and the senior vice president of the industry development division had approved his claim for RM30,869 when, in fact, only RM21,297 had been approved. The respondent had instructed his secretary, COW2, to replace the front page of the claim form and had relied on a fictitious email to support his claim. Whether or not payment was made to the respondent and that the appellant had not suffered any actual loss was irrelevant. The uncontroverted evidence showed that the respondent had attempted to submit a false claim (see para 43).

(3) The IC did not misdirect itself in failing to consider that there was no expert evidence to establish the forgery or fabrication of the email. The IC had before it sufficient audio and visual evidence to conclude that the respondent had fabricated the email. Furthermore, Ms Laura had via email on 25 May 2007 confirmed that there was no earlier meeting than that scheduled which required the respondent to be in Boston at an earlier date (see paras 44–45).

(4) There was no impropriety in the IC's decision-making process. The reasoning behind its award was not tainted by any irrationality nor was the award tainted by any illegality. The High Court judge erred in trying to substitute her findings for the findings of the IC when there was no justification to do so. The IC had considered and dealt with the issues on

their substantial merits based on the evidence. It had taken into account the entire evidence, the facts and the circumstances at the material time and concluded that the respondent's dismissal was with just cause (see paras 46–47).

[Bahasa Malaysia summary

Perayu dipecat daripada pekerjaannya oleh responden selepas satu inkuiri domestik mendapati dia bersalah kerana: (a) memalsukan tuntutan perjalanan luar negaranya ('OTA') untuk menipu jabatan kewangan perayu agar mempercayai bahawa OTA yang diluluskan untuknya adalah RM30,869 sedangkan, sebetulnya, hanya RM21,297 yang diluluskan; (b) menulis emel rekaan yang kononnya dialamatkan kepada dirinya dari seorang dari Amerika untuk menipu perayu agar mempercayai bahawa responden perlu hadir dalam mesyuarat di sana tiga hari lebih awal dari yang dijadualkan untuk memberi justifikasi buat OTA yang dipalsukan; dan (c) menyalahgunakan kedudukannya dalam syarikat dengan menggunakan komputer setiausahanya untuk menulis dan menghantar beberapa emel kepada pelbagai pihak seolah-olah kesemuanya dihantar oleh setiausahanya, sedangkan, setiausahanya tiada pengetahuan tentang kesemua emel ini. Responden memohon ganti rugi bawah Akta Perhubungan Perusahaan 1967 bagi pemecatannya. Aduannya dirujuk oleh Menteri kepada Mahkamah Perusahaan ('MP') bagi adjudikasi. Selepas perbicaraan, MP memutuskan perayu telah membuktikan tiga pertuduhan terhadap responden dan bahawa pemecatannya adalah tanpa alasan atau sebab yang adil. Mahkamah Tinggi membenarkan permohonan semakan kehakiman oleh responden untuk membatalkan award MP. Mahkamah mengembalikan hal perkara ini semula kepada MP untuk mentaksir pampasan sebagai ganti pengembalian kedudukan jawatan yang perlu dibayar kepada responden bagi pemecatan salah. Mahkamah Tinggi memutuskan, antara lain, bahawa: (i) MP terkhilaf secara undang-undang kerana tidak mempertimbangkan kesahan dan kerelevanan inkuiri domestik ('DI'). Ini kerana responden bergantung pada nota prosiding DI untuk menunjukkan dia tiada niat menipu perayu dalam keadaan yang dinyatakan dalam ketiga-tiga pertuduhan; (ii) pertuduhan berkenaan emel rekaan tidak terbukti kerana tiada keterangan pakar yang dikemukakan untuk membuktikan bahawa emel tersebut dipalsukan atau direka; (iii) keterangan tidak menunjukkan apa-apa niat oleh responden untuk menipu atau memperdaya kerana dia tidak pernah menerima jumlah yang dipalsukan dalam OTA; dan (iv) MP melakukan kekhilafan serius bawah undang-undang dalam mencapai keputusannya termasuk mengambil kira perkara-perkara tidak relevan, tidak mengambil kira perkara-perkara relevan dan bertindak bertentangan dengan keberatan keterangan. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan menghidupkan semula award MP:

(1) Walaupun Mahkamah Perusahaan ('MP') mungkin tidak merujuk atau bersandar pada not prosiding inkuiri domestik ('DI'), MP telah mendengar kes ini berdasarkan meritnya. Responden dan perayu diberi peluang memanggil saksi-saksi untuk memberi keterangan menyokong kes-kesnya. Mahkamah Perusahaan tidak perlu bergantung sepenuhnya pada nota prosiding DI dan tidak salah untuknya memerintahkan perbicaraan penuh untuk memutuskan sama ada salah laku yang didakwa terbukti dan sama ada salah laku yang dibuktikan membentuk alasan atau sebab yang adil bagi pemecatan. Terdapat banyak keterangan yang menyokong beberapa dapatan MP tentang keputusannya memilih keterangan perayu berbanding responden (lihat perenggan 34–36)

(2) Mahkamah Perusahaan mengguna pakai pendekatan yang betul dan mengguna pakai standard pembuktian yang betul dan atas imbangan kebarangkalian, mendapati perayu telah melakukan tindakan-tindakan yang dinyatakan terhadapnya. Terdapat lambakan keterangan bahawa responden cuba menipu jabatan kewangan perayu agar mempercayai bahawa CEO dan timbalan kanan presiden Jabatan Pembangunan Industri telah meluluskan tuntunnya bagi RM30,869 sedangkan, sebetulnya, hanya RM21,297 yang diluluskan. Responden telah mengarahkan setiausahanya, COW2 untuk menggantikan muka hadapan borang tuntutan dan bersandar pada emel rekaan untuk menyokong tuntutannya. Sama ada atau tidak bayaran dibuat kepada responden dan bahawa perayu tidak mengalami kerugian tidak relevan. Keterangan yang tidak boleh disangkal menunjukkan responden cuba menyerahkan tuntutan palsu (lihat perenggan 43).

(3) Mahkamah Perusahaan tidak tersalah arah dalam mempertimbangkan tiada keterangan pakar untuk membuktikan pemalsuan atau rekaan emel. Mahkamah mempunyai keterangan audio-visual untuk membuktikan responden mereka emel tersebut. Tambahan lagi, Cik Laura melalui emel bertarikh 25 Mei 2007 mengesahkan tiada mesyuarat yang lebih awal dari mesyuarat yang dijadualkan yang memerlukan responden berada di Boston pada tarikh yang lebih awal (lihat perenggan 44–45).

(4) Tiada ketakaturan dalam proses buatan keputusan MP. Sebab sebalik award ini tidak tercemar dengan ketakrasionalan dan award ini juga tidak tercemar dengan ketaksahan. Hakim Mahkamah Tinggi terkhilaf dalam mengganti dapatan MP dengan dapatn beliau sedangkan tiada justifikasi berbuat demikian. Mahkamah Perusahaan telah mempertimbangkan dan menangani isu-isu ini berdasarkan meritnya dengan keterangan. Mahkamah Perusahaan telah mengambil kira keseluruhan keterangan, fakta dan hal-hal keadaan pada masa material dan mengesahkan penolak responden adalah dengan sebab adil (lihat perenggan 46–47).]

Notes

For cases on award, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1730–1803.

Cases referred to

Bumiputra Commerce Bank Berhad v Mahkamah Perusahaan Malaysia & Anor [2004] 7 MLJ 441; [2004] 7 CLJ 77, HC (refd)

Jye Tai Precision Industrial (M) Sdn Bhd v Victoria a/p Arulsamy [2008] 2 MLJ 57, CA (refd)

KA Sanduran Nehru a/l Ratnam v I-Berhad [2007] 2 MLJ 430; [2007] 1 CLJ 347, CA (refd)

Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537; [1995] 4 CLJ 449, FC (refd)

Plaintree Wood Products Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor [2005] 1 LNS 283, HC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)

Telekom Malaysia Kawasan Utara v Krishnan Kutty Sanguni Nair & Anor [2002] 3 MLJ 129; [2002] 3 CLJ 314, CA (refd)

Legislation referred to

Industrial Relations Act 1967 s 20

Appeal from: Application for Judicial Review No 25–218–07 of 2015 (High Court, Kuala Lumpur)

Yong Hong Cheng (Zaid Ibrahim & Co) for the appellant.
Max Yong (Shui-Tai) for the respondent.

Hasnah Hashim JCA (delivering judgment of the court):

[1] This is an appeal by the appellant (the first respondent in the High Court) against the decision of the High Court dated 28 February 2017 that allowed the applicant's judicial review application ('JR application'). The High Court granted an order for certiorari and quashed the decision of the second respondent and ordered the applicant's claim be remitted for assessment of compensation for wrongful dismissal in lieu of reinstatement with costs of RM10,000 to be paid by the first respondent to the applicant.

[2] We heard this appeal on 15 September 2017 and reserved our decision.

After perusing the records of appeal, the written submissions filed by the respective learned counsels and upon hearing learned counsels, we adjourned the matter for our consideration and decision.

[3] We now give our decision and the reasons for the same.

[4] We will refer to the parties as they were described in the High Court, the applicant, the first respondent and the second respondent respectively.

MATERIAL FACTS

[5] This was a substantive JR application filed by the applicant to challenge his dismissal from the services of the first respondent. The applicant was employed by Optica Fibre Technologies MSC Sdn Bhd ('Optica') and was confirmed as its chief technology officer with effect from 16 February 2002. He was then transferred to the Technology Policy and Research Department as Senior Manager — Advanced Technologies with effect from 1 September 2003. The applicant's last held position in the first respondent's company was as the senior manager of the Services Cluster Industry Development Division with effect from 3 July 2006.

[6] Sometime in May 2007 the applicant attended a BIO Conference and also to explore the possibility of partnership with the Harvard Medical School-Partners Healthcare Centre of Genetics and Genomics ('HPGCC') in Boston, USA. Prior to the Boston trip the applicant submitted his overseas travel claim ('OTA') for a total estimated expenditure of RM21,297 to the CEO for approval. The applicant's OTA was approved by the CEO. Subsequently, the applicant resubmitted a OTA for a total expenditure of RM30,869 when in fact only RM21,297 was approved.

[7] The first respondent issued a notice to show cause dated 29 May 2007 to the applicant and required the applicant to submit a written explanation in respect of the allegations made against him by 1 June 2007. The three charges levelled against the applicant are as follows:

(a) the first charge:

'That you on 30 April 2007 had expressly and/or impliedly authorised your Secretary, Hajjah Lennie Atikah Ahmad to submit to Finance Department a falsified Overseas Travel Claim (OTA) for a total estimated expenditure of RM30,869 in respect to your official trip to Boston, MA USA between 2 May 2007 and 12 May 2007 knowing that the details contained in the first page of the said OTA were materially different from the OTA that was approved by the Chief Executive Officer of the Company and the Sr Vice President, Industry

A Development Division on 27 April 2007 and 25 April 2007 respectively which was for a total estimated expenditure of RM21,297 in respect to the same trip to Boston thereby attempting to mislead Finance into believing that the CEO and the Sr. Vice President, Industry Development Division had in fact approved your claim of RM30,869 B when in fact only RM21,297 was approved'.

(b) the second charge:

'That you had created a fictitious email which you represented as being sent by Gold Ripin, Laura from Boston to yourself and Mr. D.T. Singh C at 9.05 PM on 1 May 2007 by extracting parts of another email sent by Gold Ripin, Laura on May 2, 2007 at 11:50PM to compose the said fictitious email which reads 'to follow up on the phone conversation that DDT and I had earlier this morning, I spoke to Raju about our agenda for our meeting scheduled for May 4.' when in fact, the actual email D from Gold Ripin, Laura states 'to follow up on the phone conversation that DDT and I had earlier this morning, I spoke to Raju about a different agenda for our meeting scheduled for Sunday, May 6' thereby attempting to mislead the company into believing that you were E required to be in Boston on 4th May 2007 instead of 6th May 2007 to attend the meeting with Harvard Medical School-Partners Healthcare System Centre of Genetics and Genomics (HPCGG) in order to justify your travel claims as contained in the false OTA mentioned in Charge 1 above'.

F (c) the third charge:

'That on that days and time stated below; used your secretary, Hajjah Lennie Atikah Ahmad's PC at her workstation on level two (2) of Multimedia Development Corporation Sdn. Bhd. to compose and send G the below mentioned emails as if they were being sent by her when she was neither agreeable to nor in control of the contents of the same thereby abusing your position as her superior'.

Date of Email	Time Sent	Recipient	cc to	bcc to	Attachments
14 May 2007	2:06PM	Ella	HH, DNK, DBG, JD, DCAT	–	Memo dated 14 May 2007 and Email dated 1 May 2007 from Laura Gold Ripin send 9:05PM
14 May 2007	6:02PM	NFO	DNK, DCAT, JD, HH	–	

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14 May 2007	6:22PM	NFO	–	–	
14 May 2007	6:39PM	NFO	–	DCAA	
15 May 2007	8:49AM	NA:: & NFO	JD, DNK, Ella, DCAT	BG, HH	
22 May 2007	9:35AM	DNK	DCAT	VS	
29 May 2007	9:52AM	DCAT	–	–	

[8] The domestic inquiry convened on 19 June 2007 and continued on 25 June 2007. At the end of the domestic inquiry the Panel of the Domestic Inquiry found that the applicant was guilty of all the three charges levelled against him. The applicant was terminated with immediate effect on 11 July 2007.

[9] Dissatisfied with his dismissal, the applicant filed a representation pursuant to s 20 of the Industrial Relations Act 1967, and eventually the said representation was referred to the Industrial Court by Honorable Minister of Human Resources and registered as Case No 11/4–297 of 2009.

THE INDUSTRIAL COURT'S AWARD

[10] The Industrial Court chairman considered and evaluated the totality of the oral and documentary evidence before him and concluded that the applicant committed the acts as stated in the three charges levelled against the him. The Industrial Court chairman accepted the evidence of the applicant's secretary, Hajjah Lennie Atikah Ahmad ('COW2') as being more credible than the applicant. COW2 testified that she had prepared the OTA and travel warrants ('TW') on the instructions of the applicant and that it was the applicant who had made the changes to the first page of the OTA and TW. The aforesaid OTA and TW were earlier approved by the CEO and submitted to the finance division.

[11] With regards to the fictitious email from Ms Laura of Gold Ripin the Industrial Court took into consideration the testimony of COW2 who had testified that she received a hard copy of the email from the applicant and that she had never seen the email. Furthermore, the contents of the email appeared to have been taken from another email sent by Ms Laura of Gold Ripin on 2 April 2007. The date the email was sent was 1 April 2007 and it referred to a meeting on 4 May 2007 instead of 6 May 2007 as stated in the actual email sent

by Ms Laura of Gold Ripin. The applicant denied that he sent the email. However, no one knew of the existence of the aforesaid email except the applicant.

[12] After the conclusion of the trial, the Industrial Court chairman handed its Award No 457 of 2015 which favored the first respondent. The Industrial Court chairman found that the applicant was dismissed with just cause and excuse. Aggrieved by the second respondent's decision, the applicant filed this JR application to challenge his dismissal from the first respondent.

AT THE HIGH COURT

The applicants' case

[13] Before the High Court, learned counsel for the applicant submitted the following arguments:

(a) the Industrial Court chairman did not consider the domestic inquiry but proceeded to hear the case de novo. The Industrial Court did not consider the validity and relevancy of the domestic inquiry at all;

(b) the Industrial Court chairman erred in law and in fact when it failed to take into consideration the principles laid down in the case *Bumiputra Commerce Bank Berhad v Mahkamah Perusahaan Malaysia & Anor* [2004] 7 MLJ 441; [2004] 7 CLJ 77 which was approved by the Court of Appeal in *Jye Tai Precision Industrial (M) Sdn Bhd v Victoria a/p Arulsamy* [2008] 2 MLJ 57;

(c) the Industrial Court chairman misdirected himself when it failed to consider that no expert evidence was produced to establish forgery and/or fabrication of the emails. The findings were based on suspicion and the best evidence was not adduced or considered by the Industrial Court chairman; and

(d) the standard of proof for fraud in civil cases was beyond reasonable doubt at the time of the award. The correct standard of proof prevailing at that time must be applied. The failure to do so is a great injustice to the applicant. There was no evidence of any intention to deceive on the part of the applicant. The fact that the applicant resubmitted his claims is evidence of his honesty. The OTA was never paid and eventually the applicant had submitted the actual travel claim based on actual expenditure.

The first respondent's case

[14] In opposing the JR application learned counsel for the first respondent submitted the following arguments:

(a) the Industrial Court had applied the correct standard of proof before arriving at its decision;

(b) there is no need for actual loss to be suffered by the employee before action is taken against the employee. The Industrial Court chairman had addressed the correct question, that is, whether the applicant gave instruction to his secretary to submit a tampered TW to the Finance Department prior to his departure to Boston. The Industrial Court chairman evaluated all the evidence before him and came to the conclusion and accepted the testimony of the applicant's secretary to be more probable than the applicant's version; and

(c) with regards to the principles enunciated in *Bumiputra Commerce Bank Berhad v Mahkamah Perusahaan Malaysia & Anor* learned counsel took cognisance of the case but cited the case of *Plaintree Wood Products Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor* [2005] 1 LNS 283 where Raus Shariff J (as he then was) said that the Industrial Court's function is to consider all the evidence before it and not rely entirely on the notes of the proceedings of the domestic inquiry. The Industrial Court can order to hear the case de novo. In the instant case therefore, there was no jurisdictional error by the second respondent.

DECISION OF THE HIGH COURT

[15] At the conclusion of the hearing of the application for judicial review, the learned High Court judge allowed the applicant's JR application with costs and remitted the case for assessment of compensation for wrongful dismissal in lieu of reinstatement. The learned High Court judge identified five material issues to be determined by the court as follows:

(a) whether the second respondent erred in law and in fact when it failed to take into consideration the principles laid down in *Bumiputra Commerce Bank Berhad v Mahkamah Perusahaan Malaysia & Anor* which was approved by the Court of Appeal in *Jye Tai Precision Industrial* and in hearing the reference de novo?

(b) whether the second respondent applied the wrong standard of proof?

(c) whether the second respondent erred in law in not taking into consideration the fact that the OTA was resubmitted for approval but no payment was made by the first respondent?

(d) whether the second respondent erred in law in not taking into consideration the findings of the domestic inquiry that no proper procedure was available for the resubmission of the OTA? and

A (e) whether the second respondent erred in law in not taking into consideration that no expert witness was called and/or the maker of the email was not called to testify that the email was fabricated?

B **[16]** The learned High Court judge was of the considered view that that the Industrial Court chairman erred in law and fact when he neither considered the domestic inquiry that was held nor place any relevancy to it. Instead he had proceeded to hear the matter de novo. In failing to consider the validity and relevancy of the domestic inquiry the Industrial Court chairman had misapplied the principles of law pertaining to the relevance of a valid domestic C inquiry. The learned High Court judge referred to several authorities and then said:

> 33. However, since the applicant had relied on the notes of the proceedings of the DI to negate the intention on his part to deceive his superior in the manner as stated D in the three charges, it was crucial for the second respondent to consider the D1 and its relevancy to the applicant's case before arriving at the award.

[17] The learned judge then concluded as follows:

E > 35. In failing to consider the validity and relevancy of the domestic inquiry, the second respondent had misconstrued and misapplied the principles of law pertaining to the relevance of a valid domestic inquiry. Hence, the applicant had demonstrated ample proof of an error of law and, therefore, I was compelled to exercise the judicial review powers of the High Court to issue an order of certiorari to quash the award.

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[18] The learned High Court judge found that the Industrial Court chairman did not err as he had applied the correct standard of proof for fraud and forgery cases at the Industrial Court, which is on the balance of G probabilities.

[19] With regards to the forgery and fabrication of the email the learned High Court judge was of the considered view that the Industrial Court chairman had misdirected himself when he failed to consider the evidence of H COW2 and Siti Safinah Salleh, an executive with the first respondent ('COW3'). Her Ladyship opined that if there was an intention to deceive on the part of the applicant he would not have instructed COW2 to submit his travel claims for approval of the finance department as per the revised OTA.

I **[20]** The Industrial Court chairman had misdirected himself when he failed to consider that no expert evidence was produced to establish the alleged forgery and/or the fabrication of the email. Her Ladyship found that there was no element of deceit because the applicant never receive the payment of the purported claim. The findings were based on suspicion and the best evidence

was not tendered. Her Ladyship concluded that the burden of proof was not discharged in establishing that the email was in fact forged and/or fabricated even on a balance of probabilities.

[21] The learned High Court judge was of the considered view that there was no intention to 'defraud' at the very outset and this manifested in the flaw of the process and procedure of the first respondent.

[22] The learned High Court judge found that the learned Industrial Court chairman had committed serious errors of law in arriving at his award. It was further noted that the learned Industrial Court chairman, amongst others, had taken into account irrelevant considerations, failed to take into account relevant considerations and material facts and had acted against the weight and the totality of the evidence in dismissing the charges against the applicant in entirety.

[23] The learned High Court judge allowed the judicial review application and issued a writ of certiorari to quash the award.

[24] The first respondent dissatisfied with the decision of the learned High Court judge appealed to this court.

THE APPEAL

[25] Learned counsel for the first respondent mounted his challenge to the learned judge's quashing of the award primarily on the following grounds and submitted as follows:

(a) the High Court erred in law and in fact when it misapplied the principles propounded in *Bumiputra Commerce Bank Berhad v Mahkamah Perusahaan Malaysia & Anor* as clarified in *Plaintree Wood Products Sdn Bhd v Mahkamah Perusahaan Malaysia & Anor*. Both the applicant and the first respondent had called the same witnesses who had testified at the domestic inquiry. The Industrial Court chairman had made a finding of fact and accepted that the first respondent had discharged the burden of proving the three charges based on the evidence of the witnesses. It was submitted by learned counsel for the first respondent that the learned High Court judge failed to appreciate that even though there was no specific reference made to the domestic inquiry the Industrial Court had heard the case on merits and concluded that the first respondent had just cause to terminate the services of the applicant;

(b) the High Court judge erred in fact and in law when it imposed a standard of proof beyond reasonable doubt on the applicant in the

second charge. The High Court judge failed to appreciate that whether the payment was made or not was irrelevant to the charge against the applicant. The advance payment would have been made to the applicant had the finance department not been alerted that the first page of the OTA was materially different than the one that was approved;

(c) the High Court judge failed to appreciate the first respondent's witness's testimony that checks were made with Ms Laura of Gold Ripin who confirmed in writing vide email dated 25 May 2007 that there was no such request for the applicant to be in Boston earlier than the date of the conference;

(d) the High Court judge erred in fact and in law when it found that the Industrial Court chairman had misdirected himself when he failed to consider that no expert evidence was led to establish forgery and/or fabrication of emails; and

(e) learned counsel for the first respondent submitted that there is no need for actual loss to be suffered by the employer before action is taken against an employee. He referred to the case of *KA Sanduran Nehru a/l Ratnam v I-Berhad* [2007] 2 MLJ 430; [2007] 1 CLJ 347. In the instant case the Industrial Court chairman had addressed the correct question and evaluated all the evidence before him and came to the conclusion that the testimony of COW2 to be more probable than that of the applicant's.

[26] Learned counsel for the applicant responded in its submission in reply as follows:

(a) it was submitted by learned counsel for the applicant that the Industrial Court had misconstrued and misapplied the principles of law regarding to the relevancy of a valid domestic inquiry. The applicant had shown errors of law and as such the High Court was compelled to exercise its judicial review powers to quash the award;

(b) learned counsel for the applicant further argued that there is no error in the findings of the High Court judge that there was no intention to deceive or mislead as the applicant had resubmitted his claims for approval when he found changes in the travel plans;

(c) both the learned Industrial Court chairman and High Court judge had correctly applied the standard of proof based on the balance of probabilities. The applicant failed to call Ms Laura to give evidence but the applicant did call Mr DT Singh (CLW2) who testified that Ms Laura was the one who requested the applicant to go to Boston two days earlier; and

(d) the best evidence in discharging the burden of proof would have been the evidence of an expert. However, in this instant case there was no expert evidence to support the first respondent's case that the emails were fabricated.

OUR DECISION

[27] In the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 and the case of *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629 the Federal Court held that the decision of the inferior tribunal may be reviewed on the grounds of illegality, irrationality and possibly proportionality and the courts are permitted to scrutinise such decisions not only for process but also for substance.

[28] It is trite law that courts should not reverse an award of a tribunal unless there is proven a clear jurisdictional error. A jurisdictional error can arise when a tribunal does not act within the proper scope of its statutory function such as whether it has acted without sufficient evidence or on no evidence, or has misconstrued the law on an issue on which its decision is founded (see: *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748).

[29] Where the findings of the Industrial Court are not grounded on illegality or plain irrationality as ruled by the Federal Court in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd*, the High Court should not seek to overturn such findings solely because the High Court judge might have come to a different conclusion. In the instant appeal before us the Industrial Court chairman preferred the first respondent's version rather than the applicant's version after reviewing the evidence of the case in its entirety.

REFERENCE TO THE DOMESTIC INQUIRY

[30] Raus J (as he then was) in *Bumiputra Commerce Bank Berhad v Mahkamah Perusahaan Malaysia & Anor* explained with clarity the Industrial Court's jurisdiction, in instances where a domestic inquiry has been held. In his grounds of judgment His Lordship explained that the jurisdiction was limited to considering whether there was a prima facie case against an employee. In the *Bumiputra Commerce*'s case, the Industrial Court should have first considered whether or not the domestic inquiry was valid and the inquiry notes were accurate. In the absence of such consideration, the Industrial Court's action in proceeding to decide the matter without any regard to the notes of inquiry could not be described as anything more than an error of law.

[31] The factual matrix in *Plaintree Wood Products Sdn Bhd v Mahkamah Perusahaan Malaysia* is different from *Bumiputra Commerce*. His Lordship, Raus J (as he then was) explained in his written judgment that the issues decided in *Plaintree Wood Product*'s case can be distinguished from that of *Bumiputra Commerce*'s:

> Dengan hormatnya saya berpendapat perkara yang diputuskan di dalam kes tersebut adalah berbeza dengan kes pemohon ini. Di dalam kes Bumiputra Commerce Sdn Bhd, apa yang saya putuskan adalah mengenai kegagalan Mahkamah Perusahaan untuk mengambilkira nota keterangan domestic inquiry yang telah dikemukakan sebagai keterangan. Mahkamah Perusahaan di dalam kes itu tidak langsung merujuk kepada nota keterangan domestic inquiry dalam membuat penilaian fakta dan kegagalan itu telah saya putuskan sebagai suatu kesilapan undang-undang. Di dalam kes pemohon ini, keadaan adalah berbeza. Kes pemohon di Mahkamah Perusahaan adalah masih diperingkat pembicaraan. Pada saya, responden kedua adalah bebas untuk membentangkan kesnya ini dan untuk menyokong dakwaan bahawa beliau telah dibuang kerja tanpa alasan yang munasabah. Di pihak pemohon pula, jika terdapat keterangan mengenai domestic inquiry, terpulanglah kepada pemohon untuk mengemukakannya. Tugas Mahkamah Perusahaan ialah untuk membuat keputusan berpandukan keseluruhan keterangan yang dikemukakan melalui keterangan-keterangan saksi yang dikemukakan oleh kedua-dua pihak. Sudah tentu Mahkamah Perusahaan tidak semata-mata terikat kepada nota prosiding di dalam domestic inquiry. Jadi Mahkamah Perusahaan adalah tidak silap untuk mengarahkan pembicaraan penuh dijalankan di dalam kes ini.

[32] The learned High Court judge in her grounds of judgment whilst stating that the principles in *Plaintree Wood Product*'s case is applicable in this case, Her Ladyship however, found that the Industrial Court chairman committed an error of law when he did not consider the domestic inquiry that was held nor did he place any relevancy to it. Her Ladyship concluded that the Industrial Court chairman had therefore misconstrued and misapplied the principles of law pertaining to the relevance of a valid domestic inquiry.

[33] The function of the Industrial Court is two-fold: firstly, to determine whether the alleged misconduct has been established and secondly, whether the proven misconduct constitutes just cause or excuse for dismissal. Failure to determine these issues would be a jurisdictional error which would merit interference by granting an order of certiorari (see: *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 4 CLJ 449).

[34] With respect, in our judgment, there is ample evidence to support the several findings of the Industrial Court chairman for his decision to prefer the evidence of the first respondent. The hearing was conducted de novo with viva voce evidence. The same witnesses for the applicant as well as the first

respondent who had testified at the domestic inquiry were called and were cross-examined at the Industrial Court hearing. A

[35] We agree with the submission of learned counsel for the first respondent that even though the Industrial Court chairman may not have referred or relied to the notes of proceedings of the domestic inquiry he had heard the case on its merits. The applicant and the first respondent were given the opportunity to call witnesses to testify in support of their respective case. B

[36] As Raus J (as he then was) said in *Plaintree Wood Product*'s case the duty of the Industrial Court is to make a decision based on the totality of the evidence before it through witnesses from both parties. The Industrial Court chairman need not rely totally on the notes of proceedings of the domestic inquiry and that it is not wrong for the Industrial Court to order a full trial for him to determine whether the alleged misconduct has been established and whether the proven misconduct constitutes just cause or excuse for dismissal. C D

THE STANDARD OF PROOF

[37] It is the contention of the first respondent that the applicant had submitted to its finance department a falsified OTA for a total expenditure of RM30,869 in respect of his trip to Boston in May 2007. By doing so the applicant had attempted to mislead the Finance Department into believing that the expenditure approved by the CEO was RM30,869. It is further contended that the applicant had created a fictitious email allegedly sent by Ms Laura of Gold Ripin confirming that a meeting was scheduled on 4 May 2007. This was done by extracting certain parts of another email which was sent by Ms Laura. There were also discrepancies in the TW. The TW kept in the CEO's office shows the travel dates to be 4 May 2007 for departure and the 11 May 2007 for arrival. The TW submitted to the finance department the travel dates indicated was 2 May 2007 for departure and 12 May 2007 for arrival. The advance for the Boston trip was not given to the applicant as he had submitted the claim late. E F G

[38] The applicant contended that all the estimates for the Boston trip was prepared and submitted by COW2. He did not doctor or fabricate any email. He went to Boston earlier because CLW2 had arranged a meeting with someone from HPGCC. H

[39] Ms Laura of Gold Ripin had confirmed vide an email dated 25 May 2007 that no meeting earlier than 6 May 2007 was scheduled and that there was a change in the schedule. COW3 testified that she had sought the confirmation for Ms Laura who confirmed that there were no activities planned that required the applicant to travel to Boston at an earlier date. I

[40] COW2 had testified that she was instructed by the applicant to prepare the OTA and TW and that the applicant had made the changes to the first page of the OTA and TW that was earlier approved by the CEO and submitted to the finance division.

[41] With regards to the fictitious email from Ms Laura of Gold Ripin, COW2 testified that she had not seen the softcopy of the email but she received the hard copy of the said email from the applicant himself who then asked her to scan it to support his justification for going to Boston earlier than the date approved. CLW2 in cross-examination had testified that he received the email but was unaware of the contents of the said email. The said email was adduced at the hearing and the Industrial Court chairman found that the email's contents appears to have been taken from another email which was sent by Ms Laura on 2 April 2007. In relation to this the learned chairman said:

> As for the fictitious e-mail form Gold Ripin, Laura no one else part from the claimant had the e-mail.COW2 had testified that she received a hard copy form the Claimant and never saw the e-mail before. The e-mail's contents appears to have been taken from another e-mail which was sent by Ms. Laura on 2 April 2007.The difference was the date it was sent that was 1 April 2007 and reference to a meeting on 4 May 2007 instead of 6 May 2007 which is on the genuine e-mail. No one else knew about this e-mail.

[42] Abdul Hamid Mohamad JCA (as he then was) in *Telekom Malaysia Kawasan Utara v Krishnan Kutty Sanguni Nair & Anor* [2002] 3 MLJ 129; [2002] 3 CLJ 314 said that the Industrial Court should not be burdened with the technicalities concerning the different standards of proof or the rules of evidence or procedure that are applied in a court of law. In the instant appeal we find that both the learned Industrial Court chairman and High Court judge had correctly applied the standard of proof based on the balance of probabilities in a case involving fraud and/or forgery. However, the learned High Court judge found that the Industrial Court chairman misdirected himself when he failed to consider the evidence of COW2 and COW3 which in Her Ladyship's opinion goes to the root of ascertaining the applicant's intention to deceive.

[43] We do not agree. We are of the view that the learned chairman adopted the correct approach and had applied the correct standard of proof and on the balance of probabilities found that the applicant had committed the acts as in the charges against him. There were overwhelming evidence that the applicant had attempted to mislead the finance department into believing that the CEO and the senior vice president of the industry development division had approved his claim of RM30,869 when in fact, only RM21,297 was approved. The applicant had instructed COW2 to replace the front page of the claim form and had relied on a fictitious email in support of his claim. Whether or

not payment was made is irrelevant to the applicant and as a result the first respondent did not suffer any actual loss. The uncontroverted evidence showed that the applicant had attempted to submit false claim.

EXPERT EVIDENCE

[44] The learned High Court judge was of the considered opinion that the Industrial Court chairman misdirected himself when it failed to consider that no expert was led to establish forgery and/or fabrication of email. In the instant case Ms Laura of Gold Ripin had confirmed via email dated 25 May 2007 that there was no earlier meeting as contended by the applicant which required him to be in Boston at an earlier date. COW3 had testified that Ms Laura of Gold Ripin had confirmed that there was no earlier scheduled meeting as alleged.

[45] There was no evidence that the applicant had forwarded a soft copy of that email so that forensic or expert analysis could be made on the said email. We are of the considered view that there was no misdirection by the Industrial Court when it failed to consider that no expert evidence to establish the forgery or fabrication as alleged. We agree with the submission of learned counsel that the Industrial Court chairman had before him sufficient audio and visual evidence to come to the conclusion that the email was fabricated by the applicant. Furthermore, Ms Laura had via email dated 25 May 2007 confirmed that there was no earlier meeting scheduled.

CONCLUSION

[46] From our observation of the proceedings conducted in the Industrial Court we detected no impropriety in the judicial making process. We are satisfied that the Industrial Court's chairman has considered and dealt with both these issues on their substantial merits, based on the evidence before him. We are satisfied that the Industrial Court's chairman had taken into account the entire evidence, the facts and the circumstances at the material time and concluded the dismissal was with just cause.

[47] Accordingly, since we are satisfied that the reasoning behind the award of the Industrial Court is not tainted by any irrationality nor the award by any illegality, with respect, the learned judge erred by trying to substitute the findings of the Industrial Court with her own findings when there was no justification for doing so. In the circumstances, the appeal is allowed with costs. We set aside the order of the High Court and reinstate the award of the Industrial Court. We order the applicant to pay costs of RM5,000 subject to payment of allocatur to the first respondent. The deposit to be refunded to the first respondent as the appellant.

A *Order accordingly.*

Reported by Ashok Kumar

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